No. 256 4

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Supreme Court of the United Sta

OCTOBER TERM, 1959

INTERNATIONAL ASSOCIATION OF MACHINISTS, F
Appellants

v.

S. B. STREET, ET AL., *Appellees*

On Appeal From the Supreme Court of Georgi

APPELLANTS' REPLY BRIEF

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Almost all the arguments made by the individual appellees are fully refuted in our main brief. We believe all their arguments are obviously fallacious. We will comment here only on the arguments on which they appear to place their principal reliance or which were not made in the courts below and not fully discussed in our main brief. We pass over the numerous inaccuracies in purportedly factual statements for which the individual appellees cite no record reference or cite only allegations in the complaint.

I. The Applicability of the Hanson Case

The individual appellees say (p. 20, see als
that in *Railway Employes' Dept.* v. *Hanson*,
225, this Court "made clear that it was ruli
that a railroad employee could be required
tribute a fair share of the cost of collective
ing". Their quotations from that case on t
and the following page refute that statem
was support of the collective bargaining age
the cost of "collective bargaining", that was

They say that this Court did not have bef
Hanson the fact that these unions engage i
ities in the legislative and political fields
our demonstration to the contrary on pages
our main brief. It is unnecessary to point
exaggerated nature of some of appellees' state
attempting to make factual distinctions betw
case and the *Hanson* case. It should s
point out that this Court reversed the
Court of Nebraska for holding section 2,
of the Railway Labor Act and agreements ma
suant thereto invalid not because there was ins
evidence to sustain that Court's finding that th
engage in activities other than collective ba
but because such circumstance was irrelevan
the restrictions in the Act (copied into the agr
on the type of union-shop agreement that
mitted and entered into.

II. The Presence and Significance of "Government

The individual appellees argue at great len
the union-shop agreements are brought about
ernment action" and seem to assume that the
or invalidity of the agreements and section 2,

of the Railway Labor Act is determined by a litmus-paper test of the presence or absence of "government action". This aspect of the case appears to have degenerated into an argument over labels with a studious avoidance of substantive content. Before adverting to specific arguments, we think some general observations will clarify the issues.

Unquestionably, the enactment of section 2, Eleventh was government action. If a competent branch of the federal government had not enacted it, repealing the prior federal prohibition of a union-shop and bringing into play the Supremacy Clause by declaring the federal intention to occupy the field, we would not have a case.

But there are all kinds of "government action". If Congress should enact a statute prescribing rates of pay for various employees on locomotives at a stated number of dollars per 100 miles in freight service or 150 miles in passenger service, or eight hours, whichever is sooner, with various differentials dependent on "weight on drivers", and with other differentials applicable to "short turnaround service", very different constitutional questions would be applicable to the determination of the validity of rates of pay so fixed than would be applicable to the determination of the validity of such rates of pay prescribed in a collective bargaining agreement entered into by a collective bargaining representative certified as such under an Act of Congress. Similarly, the validity of the union-shop agreements here involved is not determined by the same tests as would be applicable if Congress enacted a statute imposing as a condition of employment on a railroad that an employee join a union that spends part of its funds

in efforts to influence legislation or politic
or if Congress enacted a statute imposing
dition of appellees' continued employment
join the Brotherhood of Railway Clerks.

The questions would be different because
ernment action" would be different. We
at the nature of the government action, wha
ernment did, and not just its label, to dete
validity. Here Congress repealed in part
prohibition of a union-shop on the railroa
in effect preempted the application of sta
the validity of such agreements. It is very
that state law had already been excluded fr
tion in this field. In 1926 when the Railw
Act was first enacted, and again in 1934 wh
rewritten, Congress institutionalized and
form to the collective bargaining practices
in the railroad industry. It also prohibite
shop. State law was probably thereby exclu
this field. In 1951 Congress repealed in pa
hibition of a union shop. That is all th
ment action that we have here, on the fac
case.

With respect to the alleged executive "g
action", it must be unnecessary to refute the
that the union-shop agreement "was encou
virtually dictated by governmental agencies
pp. 14-15, 58-61) because of the activiti
National Mediation Board and the Emergen
If there was dictation, it was rather ineff
was a full year after the report of the
Board before the unions were able to obtai
shop agreement from the Southern Railway
agreement they did obtain was substantially

able than the recommendation of the Emergency Board. And it is utter nonsense to argue that the validity of a collective bargaining agreement is determined by different standards when it is reached without mediation than when it is reached after mediation.

The effort of the individual appellees (pp. 61-2) to rely on *Shelley* v. *Kraemer*, 334 U.S. 1, to find judicial government action is wholly misplaced for a variety of reasons. It is enough to point out that in this case such issue is entirely academic; no one has asked any court to enforce any agreement.

III. The Record Presents No Issues of Infringement of First Amendment Rights

A major segment of the brief of the individual appellees (pp. 61-106) is devoted to arguing that section 2, Eleventh and the union-shop agreement deprive them of Frst Amendment rights such as freedom of speech and freedom of the press. The entire discussion consists of pure fantasy.

Their argument appears to take two directions.

The first is predicated upon some astonishing "reasoning" of the court below, the Supreme Court of Georgia. It proceeds something as follows: The AFL-CIO sponsors some radio programs, or presents testimony to Congressional committees, espousing views with which the individual appellees disagree. The AFL-CIO derives its principal revenues from the five-cents per capita from affiliated unions, including the appellant unions to one of which the individual appellees would pay dues under the union-shop agreement. Thus what is said on those programs or in such testimony is said in part by means of appellees'

dues. Thus the appellees are deprived of
speech because, as the Supreme Court of Ge
"one who is compelled to contribute the fr
labor to support or promote [such activities
much deprived of his freedom of speech as
compelled to give his vocal support to do
opposes". R. 269. The reason this is so, t
that "There is a common saying that 'M
. . .'". Probably this "reasoning" requir
ther refutation than its description. Its
nature becomes apparent when we reflec
Government by the direct exercise of its coer
of taxation exacts money some of which
such activities as Voice of America and ch
the armed forces. It has never to our know
suggested that such expenditures by the G
violate First Amendment rights of taxpaye
isolationists or atheists.

The second approach to showing that appe
Amendment rights are infringed has no sup
ever in the record. They say, based on ps
conjecture, that the appellees are inhibited
ing their views vocally or by resort to th
cause the knowledge that part of "their"
mately can be traced to the financing of the
of views by the defendant unions or the
vocally or through the press, makes them
is futile for them to speak or print their
and this is the result of Congress having e
tion 2, Eleventh. Whether or not this
psychological analysis need not be determ
an argument advanced for the first time in
there is no evidence of any kind on the s
there is no indication that any appellee or

has been in fact psychologically inhibited by the u
shop from expressing any views he pleased in
manner he pleased. We think worth quoting
the Supreme Court of Wisconsin on the questi
the integrated bar (5 Wis. 2d 618, 623; see pp.
of our main brief):

> "The integrated Bar does not destroy eithe
> independence of the Bar or of the indiv
> lawyers. The State Bar of Wisconsin was n
> tended to control and there is no evidence or
> mation that it has controlled or attempted to
> trol the thinking of any of its members.
> the State Bar Association of Wisconsin thr
> its Board of Governors, an elected represent
> policy-making body, duly decides a policy w
> its province on behalf of the State Bar ever
> understands or should understand the policy i
> of the State Bar as an entity separate and di
> from each individual. Such pronouncemen
> the State Bar does not necessarily mea
> of its members agree with that pronounce
> nor is it necessary for them to do so.
> vidual members are free to think and t
> press their own opinions. But it is the n
> of a representative democratic organization
> the elected representatives of the group speak
> act for it in accordance with its organic laws

The appellees rely heavily on the dissenting op
in *Public Utilities Commission* v. *Pollak*, 343 U.S
to support their contention of infringement of
Amendment rights. (Brief, pp. 69, 77, 88-90,
Assuming that opinion to be sound law, the
a critical difference between that case and this
In that case the riders of Washington's busses we
free to listen or not to listen to the radio progra
they rode on busses. In this case appellees ar
trammelled in their choice of listening or not list

to the AFL-CIO radio programs and in
of reading or not reading union publica

In the *Hanson* case this Court found n
record to raise First Amendment issue
nothing in the record in this case that wa
in the *Hanson* case to raise such issues.

IV. There Is No Infringement of Fifth Amend

This was specifically held in the *Hanso*
only intimation in that case that any Fi
ment question was left open for determi
possibly different record is the sentence
235):

> "If 'assessments' are in fact impo
> poses not germane to collective bargai
> ferent problem would be presented."

It is apparent from the context that the t
ments" was carefully and precisely use
distinction to "fines and penalties" on t
and "periodic dues, initiation fees" on th
that this caveat was generated by the "b
to levy assessments for unspecified pur
tained in certain union constitutions an
ferred to in footnote 7. The present rec
no evidence that any appellant has ever
assessment for any purpose.

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* The statements on pages 93-95 of appellees' b
stated amounts that members of various of the de
"must pay" for "subscriptions" to union maga
to retain their jobs, are highly misleading. The re
show only that the unions have monthly publicatio
instances certain amounts are set aside out of d
sustain such publications and in other instances t
price to non-members is shown.

V. Matters of State Law

The individual appellees contend that certain
cedural questions raised by appellants, and the va
of a union shop in the railroad industry under Ge
law apart from section 2, Eleventh, are matte
state law conclusively determined by the court b
We recognize that this Court has repeatedly held
determinations of state law by state courts are
clusive on such questions, but subject to the rig
litigants to due process and equal protection unde
Federal Constitution. Points II, VIII, and App
A of our main brief (pp. 22-25, 87-100, 102-109)
such arbitrary, discriminatory, and capricious
cations of state law in this case as to deny appe
due process and equal protection rights under the
eral Constitution. We remind the Court of the
vance of its decision of March 21, 1960 in *Thon*
v. City of Louisville, No. 59, October Term, 19
Law Week 4193, to these issues.

Respectfully submitted,

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